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THE STATE AND THE CITIZEN

BY DAVID JAYNE HILL

It will not be contested, when the subject is carefully considered, that between the years 1776 and 1789 something happened in the thirteen American Colonies that had never before occurred in the history of the world. What happened in those thirteen fateful years was the most unique and the most notable political event yet recorded in the history of mankind—the placing, for the first time, of *all* the powers of government under the dominion and protection of law.

Let there be no mistake regarding the meaning of this assertion. Other communities of men, centuries before, had attempted to solve the problem of self-government; other nations had declared and vindicated their independence; others had established and maintained for a time their liberties; others had limited the power of kings; others had created representative parliaments; but none had ever rendered every kind and form of political power, every branch and organ of government, even the arbitrary will of the sovereign people itself, subject to fixed principles of justice affirmed as law, by which all were bound, or had bound themselves, to be held responsible.

How did this ever come to pass? It was because the American colonists had suffered from a rule of absolutism which they intended to abolish. The absolutism from which they had suffered was not merely the absolutism of a king, George III., but the absolutism of the British Parliament. They believed themselves to possess rights, inherent and defensible rights, which they intended that *no* power, not even one of their own creation, should ever be able to take away.

The American colonists were not, indeed, the first to place restrictions upon the powers of the State. For a long period the maxim had endured unchallenged, “The will of

the prince is the source of law." This had been repudiated by the English Revolution of 1689, and the doctrine had been established in England that Parliament is the source of law. Rousseau had advanced upon this by saying, "The will of the people is the source of law." But the American colonists, who believed in a law above human will, who believed in rights which it should not be in the power of any human will to abolish, freely resolved to set limits even to their own will, so far as public legislation is concerned.

As by a common impulse they came to the conclusion that arbitrary power should no longer exist among them. They would not tolerate it, and they would not aspire to it themselves. It was that from which they had suffered, and it was that which they proposed to end for ever.

But how could arbitrary power be eliminated from government, and its return in some form be for ever prevented? Obviously, only by mutually guaranteeing to themselves exemption from any form of unlimited authority; and for this there were only two kinds of guarantee:

(1) *A frame of government* in which power should be so divided and distributed that it could not assert itself in any purely arbitrary form; and

(2) *A fundamental law* placing certain "inalienable rights" beyond the reach of any person or group of influences within the State to destroy or nullify.

It was the combination of these two forms of guarantee which constituted the unique and original character of our political institutions; first in the State constitutions, where these principles were first applied, and then in our Federal Constitution, in which they united with the federative idea the fundamental conception of a division of powers and a reservations of rights.

This is the American system, and it has furnished securities for our liberties for more than a hundred and twenty-five years. During this century and a quarter it has been imitated with more or less fidelity by many other countries, but nowhere with quite equal success.

If we ask why it is that our system has not always been successful in other countries, the true answer is that it has never been entirely adopted.

France, whose first inspiration for a written constitution came from the United States, has in the mean time had eleven different constitutions. In no one of them has there

been a constitutional limitation upon legislation, enforceable by judicial decision; and no one of them, except the last, has endured for more than twenty years. Our sister republics to the south in Latin America have all had written constitutions, with a frame of government similar to ours; but, for the same reason, they have been the scene of almost constant turmoil and strife, and frequently rent with more or less bloody revolutions. We ourselves have not been exempt from at least one terrific civil war, which threatened to rend the nation in twain. It is interesting to note that the occasion for it was a question as to whether or not the Constitution was a binding or a negligible law.

What, then, is the reason why the experience of France and of the other Latin republics has been less fortunate than our own?

There are, I think, two answers to this question.

The first is that, with the exception of the contest over the right of State Nullification and Secession, we have not only respected the provisions of the Constitution as worthy of our confidence, but we have looked upon judicial interpretation of it as the palladium of our liberties.

The second answer is that we have as a people placed more emphasis upon principles than upon personalities. We believe that ours is a government of laws, and not of men. In the republics that have imitated our example this has frequently not been the case. They have preferred to follow leaders, often without knowing whither they would be led, rather than to hold fast to fixed principles and test the qualities of their leaders by their loyalty to doctrines and policies previously thought out and deliberately decided upon. With us it has been different. In the days of the American Revolution men did not believe in independence because they believed in Washington, but they believed in Washington because he was struggling for independence; nor in the days of our Civil War did they believe in Union because they believed in Lincoln, but they believed in Lincoln because he was trying to save the Union. There is something in the American character that places more confidence in settled principles than in the trumpet-call of theorists, partisans, and partitioners of patronage.

It is this quality of resistance to rapine and riot that has thus far proved the chief safeguard of the State and of the public security it is intended to afford. It may well be con-

sidered as our best ground of assurance of the perpetuity and efficiency of the Republic. It implies, however, a certain virtue in the people. Should that quality ever prove wanting, our system would lose its main support and eventually disappear.

We see, therefore, how extremely dangerous it would be to break down either that fundamental law upon which our whole structure of guaranteed liberty is erected, or the spirit of fairness in the minds of the people, without which it would soon be nullified. If, for example, there should arise among us a bitter class or sectional feeling—an unrighteous oppression of the poor and unfortunate, or a strong animosity against the rich and successful—this would undoubtedly, if played upon by ambitious demagogues, create a peril for our institutions which might result in undermining and ultimately destroying them.

This is not to speak as an alarmist, or in a tone of reproach toward any party or any class, but in a spirit of strict impartiality regarding all the elements that make up society. It is simply a question of fair play and charitable feeling. It is perfectly clear that there is more than one danger to good government; and it is equally certain that expectant beneficiaries will continue in the future, as in the past, to serve their own interests by exciting the appetites of susceptible supporters wherever they can be discovered or created. The important point is that these influences should not be permitted to prevail.

If we were to consider seriously the question, who would profit most by breaking down the guarantees of liberty and equal law—or, in short, who would come out best in a battle of class interests, without the restraint of a fundamental law, it would not be difficult to decide. If absolute power were lodged anywhere, it would, no doubt, be wealth that would in the end control it; and the poor man would be the ultimate victim of a demagogue's designs. It was the pressure of the average citizen, the man who did not mean that his liberties, however humble his station, should be taken away from him, that procured the insertion of the Bill of Rights in the Constitution. If he stops long enough to reason about it, this average man—especially the man who possesses but little and holds that little dear—will not consent without a struggle to allow that protection to be taken from him.

Recently we have heard it stated that any judge who would hold any law unconstitutional that a legislative body saw fit to make should be dismissed from the bench. In other words, men have recently denied the authority of any fundamental law whatever, and have demanded that every judge, having sworn to obey and defend the Constitution, should proceed to treat it as a nugatory document.

Now this is a question worthy of the most serious consideration by every patriotic citizen, for it strikes directly at the most vital part of the American system of government. Confessedly, the system divides and distributes power between three co-ordinate branches of authority, the legislative, the executive, and the judiciary. The intention of it is to place all these forms of power under the restraint of law—namely, under the Constitution. If the judiciary possesses no power to prevent unconstitutional legislation, what restraint is there upon the legislative body, except its own will? It would, therefore, be placed *above* the law and become the *only source of law*.

There are in this connection two points which should receive our serious attention, and yet I have never seen them anywhere clearly stated.

The first is that where the constitutional system has adhered most strictly to the American model, it has been most successful. This system provides for a complete co-ordination of the legislative, executive, and judicial functions. Where any one of them has been either suppressed or exaggerated—that is, where the regulative mechanism of the system has been ignored, there a breakdown has at some time occurred.

The second point is that a purely parliamentary government is not only unstable and fluctuating, but subject to crises which threaten the extinction of the entire government, and sometimes end in open violence and revolution.

The history of France is a startling commentary on this assertion. From the first constitution to the last, in that country, there has never been any middle course between personal absolutism on the one hand and uncontrolled parliamentarianism on the other. The result has been a periodic oscillation between monarchy and democracy, until long experience has at last taught the lesson of self-restraint which true self-government imposes. Yet, even now, although the lesson has been sufficiently learned

to prevent recurrent revolts from going further than a ministerial crisis, the people have become so accustomed to these that they hardly attract their attention, and the Republic is frequently without a government.

When we look for the cause of such perturbations, we find it in the exaggeration of executive action on the one side, or of legislative action on the other, with an almost complete neglect of the judicial function as a restraint upon executive or legislative excesses.

The judicial function is essentially the balance-wheel of our system, and it is nothing more. The judiciary can originate nothing. It can only issue a judgment that something *should* be done, or should *not* be done, under the existing state of law. The effect of its decisions, in so far as they concern the general interests of the community, is never irreparable. They may be altered by appeal to a higher court; or, if necessary, the law, and even the fundamental law, may be changed. If, however, it could be changed upon the instant, or by a wave of popular excitement, or by the majority vote of a temporary parliamentary body, left free to enact any statute that might for the moment seem to commend itself, there could be no means of foreseeing of what rights a citizen might soon be deprived, or what new and onerous exactions might be suddenly imposed upon him. With all calculability removed from the sphere of practical action, industrial enterprise would be smitten with paralysis. Thus all classes, even if violence did not occur, would be the sufferers; and it would be those who are most dependent upon others who would suffer most.

It is sometimes alleged that a distinction is made between the rich and the poor; that rich men can obtain favorable decisions in the courts, while the poor cannot.

To say that no judge has ever made a mistake, or ruled unjustly, or been actuated by prejudice or self-interest, would certainly be a bold assertion; but, in general, the American judiciary has never merited that reproach. Physically, mentally, and morally, judges are only human beings; yet they are intended to be, and usually are, men of superior intelligence, character, and education. If they are not, it is the people who are responsible.

It is possible to admit freely all that has ever been proved, or even all that has ever been said or insinuated, in con-

demnation of our courts, without in the least affecting the high importance of the fundamental law, or the necessity for judicial restraint upon the other organs of government. The true reply to this criticism is not a defense of the courts, which may need correction, but the consideration of what would happen if legislative freedom were not limited by constitutional principles. Have legislative bodies shown themselves so just, so wise, so unaffected by class or party influences that they are to be intrusted with absolute and unrestrained authority?

And if parliamentary government is not to be trusted without restraint, what is to be said of the direct action of majorities, without debate, without deliberation, without a knowledge of existing law, or a due appreciation of the effect of purely improvised legislation?

We shall, therefore, make no true progress toward realizing the ideal State by a radical change in our form of government, and least of all by the abolition of our fundamental law. Without that law the separation of powers would be of no avail. The French constitutions, equally with our own, were based on the doctrine of divided power, but without judicial authority over public action. As President Lowell has said, "The French statesmen took Montesquieu's doctrine in the sense that the administrator ought to be free to act for the public weal without let or hindrance from the courts of law"; in short, that the courts have no power of restraint in matters of public law or action.

It is precisely in that respect that our system differs from all the imitations of it, and precisely by that difference that our success in maintaining our system for a century and a quarter, essentially unaltered, has been made possible. Would it not be an act of sacrilege to destroy that system now?

Such being the theory of the State as our forefathers conceived it, what is the normal relation of the Citizen to the State?

The growth of the nation in geographic extent, in population, and in the multiplicity of its relations, internal and foreign, as a dual and federated system, has certainly not rendered that relation more simple, but infinitely more complex. Yet, in an age when special and expert knowledge is more than ever necessary, and when it is demanded in every phase of our economic life, and possessed and employed by

all our chief competitors in the realm of international trade and the industries that make commerce possible, there is now, for the first time in the history of our country, a loud clamor for direct popular action upon every great question; as if omniscience were in some mysterious manner inherent in the preponderance of mere numbers.

It is, indeed, important that all the sense of justice and all the intelligence which our population of nearly a hundred millions possesses should be brought to bear upon the public policies of the nation. But how is this to be done? Is it to be done by an appeal to the unguided *will* of the people, without precise knowledge of the matters involved, but intensified by class and sectional prejudices? Or is it to be done by an appeal to the *reason* of the people, after competent masters of the subjects to be considered have made their reports upon them, and these have been subjected to comparison, debate, and deliberate examination by those who have formed definite opinions regarding them?

There would seem to be but one reasonable answer to this question. The plain duty of every citizen is, first, to instruct himself; then to try to fix in his mind the principles by which the common good may be most clearly promoted; and, finally, in a spirit of patriotism to place his influence at the service of those principles.

There are, no doubt, many new directions in which public policies are yet to be formed, and there are many questions which are ripe for discussion. There are forms of social justice which seem to force themselves upon our attention, and we cannot without delinquency neglect them; but the question may be fairly asked, Is there anything which, as a people, it would be right for us to do that cannot be done without a reconstruction of the State, and especially without radical changes in our fundamental law?

Believing that the vast majority of the American people wish to do right, and have always wished to do right, the answer to this question seems very simple. Until it is shown that there is some definite thing which we ought to do, but which we are prevented by our form of government from doing, we shall act wisely in adhering strictly to a system which has enabled us to make progress—singularly rapid and permanent progress—toward the highest ideals that our people have ever at any time entertained.

What we have achieved in the past has been accomplished

by acting together. A score of transient enthusiasms have at times swept over the country; and there have been moments when precipitate action, even by a majority, might have been possible and certainly would have been wrong. It is needless to wound the feelings of good men by citing instances which would only remind them how erroneous their judgments have sometimes been, or to terrify them by recalling how near to the brink of ruin the country has more than once been brought by proposals that seemed seductive at the time, but are now seen to have been illusory and sophistical.

In a letter addressed to Thomas Jefferson by James Madison it was pointed out that, "wherever the real power of government lies, there is danger of oppression. "In our government," he continues, "the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended not from acts of the government contrary to the sense of the constituents, but from acts in which the government is a mere instrument of the major number of constituents. . . . Where there is an interest and a power to do wrong, wrong will generally be done, and not the less readily by a powerful and interested party than by a powerful and interested prince."

There are some things which majorities ought not to do, or be permitted to do; but which they are likely to do, if they have not the nobility to renounce their own absolute power. This our fathers saw, and they freely surrendered this power, pledging and binding themselves not to violate certain "inalienable rights" which they claimed for themselves and voluntarily accorded to others.

This is essentially the spirit of our Constitution. This it is that has made us a great and prosperous nation. Our fundamental law is hostile to no one. It is every man's friend, and no man can tell when he will need its friendship. So long as our citizens manifest the same spirit, we shall remain the same free people; with the guarantee, for ourselves and for our descendants, that neither wealth, nor numbers, nor any other form of personal or organized power shall be able to oppress by any form of arbitrary authority even the humblest of our fellow-citizens.

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